Statement Regarding the Nomination of Jeffrey S. Sutton to the United States Court of Appeals for the Sixth Circuit

January 27, 2003

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SUMMARY

- Opposition to Jeff Sutton's nomination to the Sixth Circuit rests on several misunderstandings and distortions of federalism and the constitutional structure.

- Federalism is an essential feature of the constitutional structure. Like separation of powers, federalism was designed to prevent tyranny and preserve individual liberty by dividing government power.

- Federalism is neither inherently liberal nor inherently conservative. Federalism merely allocates governmental power between two levels of government, leaving each free to pursue liberal or conservative ends.

- There is no basis for the charge that upholding constitutional federalism is anti-civil rights. The Civil War Amendments prohibit states from discriminating against individuals based on race and sex, and give Congress express power to enforce this prohibition by appropriate legislation.

- Many of the country's most significant civil rights measures were enacted by states well *before* the adoption of similar laws at the federal level. Giving Congress unlimited federal power could just as readily be characterized as anti-civil rights because such power would allow Congress to curtail civil rights by pre-empting state civil rights laws that provide greater protection than federal law.

- Charges that judicial efforts to police the bounds of Congress's enumerated powers constitute "judicial activism" are misguided. Under the constitutional structure, Congress cannot authoritatively determine the scope of its own powers without violating basic notions of separation of powers and checks and balances. The Founders anticipated that Congress would sometimes exceed its powers and established the "judicial Power of the United States" to guard against such abuse.

- Requiring judicial nominees to accept the Senate's interpretation of the Constitution as a condition of confirmation would threaten judicial independence and undermine the constitutional separation of powers.

- The Supreme Court's recent sovereign immunity decisions are consistent with longstanding precedent and are well within the mainstream of legal thought.

I. Federalism is an Essential Feature of the Constitutional Structure

Federalism refers to the Constitution's division of governmental power between the federal government and the states. The Constitution delegates limited and enumerated powers to the federal government and reserves the balance of powers "to the States respectively, or to the people." U.S. Const. Amend. X. As James Madison stressed in urging ratification of the Constitution: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *The Federalist No. 45*.

Like the constitutional separation of powers, federalism was meant to guard against the excessive accumulation of government powers in the same hands, and thereby to preserve individual liberty. As Madison explained:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.

The Federalist No. 51. Thus, federalism is an essential feature of the constitutional structure that functions to safeguard the "rights of the people."

II. Federalism is Neither Liberal Nor Conservative

Federalism is neither inherently liberal nor inherently conservative. By dividing power between the federal government and the states, the Constitution leaves each level of government free to use its respective powers to pursue whatever it thinks best, whether liberal, moderate, or conservative. On many issues—such as race, sex,

age, and disability—states actually adopted anti-discrimination laws well before Congress enacted federal legislation. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 n.1, 92 (2000) (noting that states had enacted anti-discrimination laws before Congress); *Bd. of Trustees v. Garrett*, 531 U.S. 356, 368 n.5, 374 n.9 (2001) (same). Moreover, even today, many states have anti-discrimination laws that guarantee protected groups *greater* protection than federal law affords. To be sure, federalism generates more legal diversity than a uniform federal approach, but such diversity frequently favors rather than disfavors minorities. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535 (1986).

III. **The New Federalism is Not Anti-Civil Rights**

The Supreme Court's recent federalism decisions are not "anti-civil rights." Constitutional federalism does not permit the states to discriminate against any groups protected by the Fourteenth Amendment. The Civil War Amendments prohibit discrimination based on race and sex, and give Congress power to enforce these restrictions by "appropriate legislation." The Civil War Amendments give Congress broad power to stamp out all forms state-sponsored discrimination against protected groups wherever found, including the areas of voting, education, and employment. Congress also enjoys broad power under the Commerce Clause to enact legislation over all matters that substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549 (1995). Congress has appropriately used this power to prohibit many forms of discrimination.

As noted, many states have adopted broader anti-discrimination laws than the federal government. Under the constitutional structure, such laws generally do not apply to the federal government unless the United States consents to be bound thereby. Those who judge the constitutional structure solely in terms of compliance with civil rights statutes should therefore conclude that the federal government itself is "anti-civil rights." Moreover, giving Congress unlimited federal power could also be characterized as "anti-civil rights" because such power would permit a conservative Congress to pre-empt state civil rights laws that go beyond federal law. Standing alone, however, the mere possession of power by the federal government or the states is neither pro- nor anti-civil rights.

IV. Upholding Federalism Does Not Constitute Judicial Activism

Some critics have charged that the Supreme Court's recent federalism decisions constitute "judicial activism." This charge misunderstands the proper role of the judiciary in the constitutional structure. The Constitution establishes a federal judiciary with life tenure and salary protection in order to ensure judicial independence from the political branches. Such independence was designed in part to permit the judiciary to uphold the Constitution against even the most popular legislation. Thus, if Congress enacts a statute beyond its constitutional authority, courts are fully justified---and indeed constitutionally compelled---to disregard such statutes in order to exercise "the judicial Power of the United States" in accordance with the Constitution. Although Congress may disagree with the Court's interpretation, Congress cannot authoritatively determine the scope of its own powers

without violating basic notions of separation of powers and checks and balances. *See Marbury v. Madison*, 5 U.S. (1 Cranch), 137 (1803).

V. The Senate Should Not Undermine Judicial Independence

Any requirement that judicial nominees prospectively agree with Senators' interpretation of the Constitution would threaten judicial independence. Separation of powers requires that the judicial branch remain independent of the legislative and executive branches. Although the President and the Senate appoint federal judges, neither should use this power to secure pre-commitments from nominees as to how they would rule as judges in particular cases. Such a practice would enable the political branches to undermine an essential constitutional check against unconstitutional action. The federal flag burning statute provides an example. Congress passed the statute by overwhelming majorities in both Houses, and the President signed the bill into law. In *United States v. Eichman*, 496 U.S. 310 (1990), the Supreme Court invalidated the statute under the First Amendment. Efforts to adopt a constitutional amendment failed to garner sufficient support. Suppose proponents of the flag burning statute attempted to use the confirmation process to overturn the Court's decision. Senators who favored the statute could simply refuse to confirm judicial nominees who did not expressly endorse the constitutionality of the statute. No matter how strongly Senators felt about the issue, such an approach would threaten judicial independence and constitute a highly questionable use of the confirmation process.

VI. The Supreme Court's Sovereign Immunity Decisions are Within the Mainstream of Legal Doctrine

Although some have criticized the Supreme Court's sovereign immunity decisions, these decisions are well within the mainstream of legal thought. For over a hundred years, the Court has recognized broad state sovereign immunity from suit in federal court, even in cases arising under federal law. *See Hans v. Louisiana*, 134 U.S. 1 (1890) (unanimous). The Court has recognized an exception to such immunity when Congress acts pursuant to Section 5 of the Fourteenth Amendment to remedy discrimination prohibited by the Amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Court has reaffirmed, however, that Congress lacks power to abrogate state sovereign immunity pursuant to its Article I, Section 8 powers. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). This distinction has led proponents of abrogation to urge broader and broader conceptions of Congress's Section 5 power.

The Supreme Court, however, has long recognized the limits of such power. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), for example, the Court invalidated Congress's attempt to lower the voting age in state elections from 21 to 18. Because age is not a suspect classification under the Fourteenth Amendment, Congress lacks power under Section 5 to require states to adopt a uniform voting age. In order to lower the voting age, therefore, Congress and the States had to adopt the Twenty-sixth Amendment in 1971. The Supreme Court's more recent decisions reaffirm that Congress's power under Section 5 of the Fourteenth Amendment is limited to remedying violations of Section 2 of the Amendment.

A broader reading of Section 5 would not only threaten federalism, but also undermine the constitutional separation of powers by permitting Congress to usurp the Supreme Court's longstanding power to say what the law is. *See Marbury v. Madison*, 5 U.S. (1 Cranch), 137 (1803). For example, in *City of Boerne v. Flores,* 521 U.S. 507 (1997), the Court invalidated a congressional attempt to overturn the Supreme Court's interpretation of the First Amendment. The Court ruled, without dissent on this point, that such action exceeded Congress's Section 5 power and was inconsistent with the constitutional separation of powers. Many of the criticisms of the federalism cases rest on the false assumption that Congress can unilaterally alter constitutional rights. This approach would write out of the Constitution Article V, which lays out precise procedures for amendment, and undermine the separation of powers, which authorizes courts to interpret the Constitution in the course of deciding cases.

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January 27, 2003

The Honorable Orrin G. Hatch
Chairman, Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Patrick J. Leahy
Ranking Member, Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Jeffrey S. Sutton

Dear Chairman Hatch and Senator Leahy:

Please find enclosed a statement we have prepared regarding the nomination of Jeffrey S. Sutton to the United States Court of Appeals for the Sixth Circuit. We teach and write in the field of constitutional law and federalism, and believe that opposition to Mr. Sutton's nomination rests on several misunderstandings and distortions of federalism and the constitutional structure. We hope that this statement will be of use to you in the confirmation process.

Sincerely,

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cc: Viet D. Dinh, Assistant Attorney General
Alberto R. Gonzales, Counsel to the President